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8
9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12 In Re: DEMMIE BALAURO ACOSTA,¹

13 Debtors.

) Chapter 11

) Case No: 09-32339 DM

) R.S. No SPS -79

) Consolidated for Administration Only

) Date: September 22, 2009

) Time: 1:30 p.m.

) Courtroom 22, 19th Floor

) 235 Pine Street

) San Francisco, California

) DEBTOR'S OPPOSITION TO MOTION FOR
RELIEF FROM STAY
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25 ¹ The Debtors in these cases are Demmie Balauro Acosta and Beriong Investments, LLC.
The address for Debtors is 171 Kenwood Avenue, San Francisco, California 94127.
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1 **I. FACTS**

2 The debtor and debtor in possession, Demmie Acosta ("Mrs. Acosta") owns 15 parcels
3 of real property in the San Francisco Bay Area, not including 1303 Kiely Blvd, Santa Clara, the
4 property that is the subject of this motion ("Subject Property"). Of those properties 13 are held
5 in her own name and two are held by a limited liability company of which she is the sole
6 member. The moving party, BAR-K, Inc., as servicing agent for R.E. Loans, LLC, ("BAR-K")
7 holds deeds of trust on eight of the properties, and prior to the commencement of this case
8 held a seventh deed of trust on the Subject Property. The deeds of trust secure a single loan,
9 which the moving papers assert has a current balance of \$3,102,610, including late charges,
10 default interest and advances.

11 BAR-K's loan is secured by a first priority deed of trust on 2640 Leavenworth Street,
12 San Francisco, which in 2008 had an appraised value of \$4,500,000.¹ BAR-K has second
13 priority deeds of trust on the remaining seven properties. The first loans on those properties in
14 the aggregate have balances of approximately \$2,600,000, and had aggregate appraised
15 values in 2008 of \$9,785,000. Thus BAR-K's \$3,100,000 loan is secured by property having
16 an appraised value in excess of \$14,000,000, less \$2,600,000 in senior liens; or a net equity of
17 approximately \$11,775,000. Even a ten percent reduction from the 2008 appraised values
18 would leave BAR-K with an "equity cushion" of \$10,000,000 securing its \$3,000,000 loan. It
19 seems apparent, given those facts, that this case provides a basis for reorganizing and either
20 paying off or substantially reducing the debt owed to BAR-K.²

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23 ¹ Mrs. Acosta concedes that there most likely has been some general decline in real estate
24 values since the 2008 appraisals. An internet search for data on real property values indicates
25 that the decline in *home values* in Santa Clara County since 2008 is in a range of between
26 12.4% and 18%. (See Group Exhibit 1, attached. No data was found for multiple dwellings.)
At a rough average of 15%, the 2009 value of the Subject Property would be approximately
\$484,500, leaving an equity cushion for BAR-K of over \$200,000.

27 ² Two other large secured creditors of Mrs. Acosta have similar "blanket" deeds of trust
28 securing single loans, and they are similarly well secured. The plan of reorganization will also
provide for appropriate treatment of those claims.

1 Notwithstanding its well secured position, BAR-K elected to foreclose on one of the
2 properties securing its loan, namely the Subject Property: 1303 Keily Blvd, Santa Clara. The
3 trustee's sale under its deed of trust was concluded on August 12, two days prior to the
4 commencement of this case on August, and the trustee's deed was recorded six days later on
5 August 18. The moving papers do not inform the court as to the result of the bidding at the
6 trustee's sale, other than to state that BAR-K "underbid at the foreclosure sale" (Declaration of
7 Kelly Ng ("Ng Dec."), ¶ 14, p. 4). BAR-K requests relief from the stay to take possession and
8 collect the rents of the Subject Property.

9 **II. ARGUMENT**

10 Mrs. Acosta concedes that prevailing case law favors BAR-K's motion with respect to its
11 right to take possession of the real property and collect the rents. *In re Bebensee-Wong*, 248
12 B.R. 820 (9th Cir BAP 2000). However, Mrs. Acosta does not agree that the stay should be
13 lifted for all purposes, at least until she has had an opportunity to investigate the conduct of the
14 trustee's sale and determine whether it was conducted in good faith.

15 In its motion BAR-K states that the subject property was appraised for \$570,000 in 2008
16 and that the lien senior to BAR-K's lien was in the amount of \$258,547 (Ng Dec., ¶¶ 17 and 20,
17 p.5). Even assuming some decline in value since 2008, it is unlikely there was no equity in the
18 property above the first lien securing BAR-K's second priority lien.³ However, because BAR-
19 K's lien secured a debt of some \$3 million, there would most likely have been no independent
20 bidding at the sale, as BAR-K could outbid any other bidder up to and even in excess the full
21 value of the property. The question the is whether BAR-K bid in a manner to credit the debtor,
22 and ultimately the bankruptcy estate with the value of the equity in the Subject Property in
23

24
25 ³ BAR-K states the property was in disrepair; however, it does not indicate whether that is a
26 change of condition since the 2008 appraisal.

1 excess of the first priority lien. Or did it bid one dollar and obtain a windfall for itself at the
2 expense of the debtor and her estate?

3 If, indeed, BAR-K bid only one dollar, or some similar amount, it could replicate that
4 process on all the remaining properties on which it has a second priority lien and wipe out
5 millions of dollars of equity value, without reducing its debt in a significant manner. That
6 clearly would be inequitable and would not be allowed by this court. However, there is no
7 reason not to impose a rule of equity starting with the Subject Property in order to protect the
8 interests of the estate and its creditors.

9 This court has ample discretionary authority to fashion appropriate relief from the stay.
10 As the Bankruptcy Appellate Panel said in *In re Delaney-Morin*, 304 B.R. 365, 369 (9th Cir.
11 BAP 2003), "Thus, section 362 gives the bankruptcy court wide latitude in crafting relief from
12 the automatic stay." Accord: *In re Avila*, 311 B.R. 81, 84 (Bkrcty. N.D. Cal. 2004). As Judge
13 Morgan said in *In re Avila*, supra:

14 "Exercising discretion in determining cause for stay relief requires
15 the balancing of hardships and consideration of the totality of
16 circumstances. ***** Where a creditor is adequately protected by a
17 large equity cushion, the debtor would suffer a substantial loss in
18 the event of foreclosure, and no economic harm to the creditor
19 would result, relief from the stay should not automatically follow a
20 default in payment."

21 This case fits the circumstances described in the above quotation. BAR-K is adequately
22 protected in the aggregate by an equity cushion in the properties securing its loan by at least
23 three times the amount of its current loan balance. It should not be permitted to foreclose *in*
24 *seriatim* on the properties where it holds second priority liens without at minimum giving full
25 credit for the equity it acquires in each such property.

1 Mrs. Acosta requests that the stay be continued in effect and that the matter be set for a
2 final hearing in order to provide time for Mrs. Acosta to investigate whether BAR-K conducted
3 a valid, good faith trustee's sale.⁴

4 In addition, Mrs. Acosta has not had an opportunity to determine whether the charges
5 included in BAR-K's claim, such as monthly late fees and default interest, are permitted under
6 the loan documents. Mrs. Acosta reserves the right at an appropriate time to object to BAR-
7 K's claim.

8 **III. CONCLUSION**

9 For the reason stated above, Mrs. Acosta requests that the court deny the motion and
10 set this motion for a final hearing without 30 days.

11 Dated: September 21, 2009

NOSSAMAN LLP

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14 By: 
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John T. Hansen
Attorneys for Demmie B. Acosta, Debtor in
Possession
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25 ⁴ The court may take notice of the fact that this complex case is only slightly more than 30
26 days old, that the debtor initially filed the petition without counsel, and that the court approved
the employment of counsel just two weeks ago.

US California **Santa Clara** ZIP Code Views: 29,131**Santa Clara**

\$532,600

-12.4% Y-o-Y

Calculated 09/09/2009*

	Region	M-o-M	Q-o-Q	Y-o-Y	Jul 2009
<input checked="" type="checkbox"/>	Santa Clara	0.1%	—	-12.4%	\$532,600

*Includes data and transactions through 07/31/2009

EXHIBIT 1

SEPTEMBER 21, 2009

DQNews Home DataQuick Latest Release DQ Custom Reports

NEWS

- California
 - Southern CA
 - Bay Area
 - CA
- Foreclosures
- \$Million Home Sales
- Denver
- Las Vegas
- Miami
- Phoenix
- Portland
- Seattle

Phoenix July 2009 Home Sales (August 29, 2009)

Bay Area home sales hit 4-year high; median price up again

August 21, 2009

San Jose, CA.----Bay Area home sales rose last month to the highest level for a July in four years as deals above \$500,000 continued to accelerate. The median sale price climbed above the prior month for the fourth consecutive month, lifted by the combination of more high-end transactions and fewer sales of lower-cost, lender-owned foreclosures, a real estate information service reported.

The median price paid for a home in the nine-county region rose to \$395,000, up 12.2 percent from \$352,000 in June, but down 16.0 percent from \$470,000 in July 2008, according to MDA DataQuick of San Diego.

Although last month's median was 36.2 percent higher than the current cycle's low of \$290,000 in March this year, it was still 40.6 percent below the peak \$665,000 median reached in June and July of 2007.

The median's \$43,000 gain between June and July was mainly the result of a shift toward a greater portion of sales occurring in higher-priced neighborhoods. The trend has been fueled this summer by several factors, including: More distress in high-end areas, leading to more motivated sellers; more buyers sensing a bottom could be near; and increased availability of larger home loans, which had become more expensive and far more difficult to obtain after the credit crunch hit two years ago.

Loans above \$417,000 accounted for 30 percent of Bay Area home sales last month -- the highest since they represented 31.9 percent of sales in August 2008. Before the August 2007 credit crunch, such "jumbo" loans over \$417,000 represented more than 60 percent of sales.

In another sign of a gradual comeback in home financing, the percentage of Bay Area homes purchased last month with an adjustable-rate mortgage rose to 6.6 percent -- up from a record low of 3.0 percent in January 2009. The median sale price for homes purchased with those adjustable-rate loans last month was \$766,500, while the median loan amount was \$523,500. Adjustable-rate mortgages averaged about 61 percent of all Bay Area purchase loans this decade up until the credit crunch, after which they began to dry up quickly.

Sales of \$500,000-plus existing single-family detached houses rose to 35.6 percent of all house resales last month, up from 34.1 percent in June and up from a low this year of 22.7 percent in January. Last month's \$500,000-plus sales were the highest since they were 38 percent of sales last September.

As high-end sales have taken off in recent months, sales of foreclosures in less-expensive inland areas have tapered off. Last month 34.2 percent of the Bay Area homes that resold were foreclosure resales -- homes resold in July that had been foreclosed on in the prior 12 months. Last month's foreclosure resale level was the lowest since it was 33.3 percent in July 2008. Foreclosure resales peaked at 52 percent of all Bay Area resales in February this year.

The drying up of the lower-cost foreclosures helps explain why July sales of sub-\$300,000 existing single-family houses dropped to 37.8 percent of house resales. That was down from a high this year of 48.9 percent of resales in March.

"In the San Francisco Bay Area and across California we continue to see the market moving gradually back toward a more normal balance of sales across all price ranges. The high end of the market finally has a pulse and that has led to a swift rise in the median sale price. It's the opposite of what we saw two years ago, when the credit crunch slammed the brakes on jumbo lending and sales of more expensive homes screeched to a halt. That triggered a near free-fall in the median sale price," said John Walsh, MDA DataQuick president.

"Evidence is mounting that in some areas we've approached at least a soft bottom for home prices," he said. "But we continue to view that possibility with an abundance of caution, given all of the uncertainty over future foreclosure inventories and ongoing job cuts. The market remains vulnerable."

A total of 8,771 new and resale houses and condos sold in the nine-county Bay Area last month. That was up 1.5 percent from 8,664 in June and up 15.6 percent from 7,586 in July 2008.

Although last month's sales were the highest for the month of July in four years, and the highest for any month since August 2006, they were still 7.8 percent lower than the average of 9,512 homes sold during the month of July going back to 1988, when DataQuick's statistics begin. July sales have varied between a low of 6,666 sales in 1995 and a peak of 14,258 in 2004.

San Diego-based MDA DataQuick is a division of MDA Lending Solutions, a subsidiary of Vancouver-based MacDonald Dettwiler and Associates. MDA DataQuick monitors real estate activity nationwide and provides information to consumers, educational institutions, public agencies, lending institutions, title companies and industry analysts. Because of late data availability, sales counts were estimated in Alameda and San Mateo counties.

The typical monthly mortgage payment that Bay Area buyers committed themselves to paying was \$1,739 last month, up from \$1,585 the previous month, and down from \$2,359 a year ago. Adjusted for inflation, current payments are 33.7 percent below typical payments in the spring of 1989, the peak of the prior real estate cycle. They are 51.0 percent below the current cycle's peak in July 2007.

Indicators of market distress continue to move in different directions. Foreclosure activity is off its recent peak but remains high by historical standards, while financing with adjustable-rate mortgages is edging higher but remains low, as does financing with multiple mortgages. Down payment sizes are stable and non-owner occupied buying activity is above-average in some markets, MDA DataQuick reported.

	Sales Volume			Median Price		
	Jul-08	Jul-09	%Chng	Jul-08	Jul-09	%Chng
All homes						

CHARTS

Monthly Charts:

- CA City Chart
- Capital Region Chart
- Central Valley/Coast Chart
- LA Times Chart
- O.C. Register Chart
- Sacramento Bee Chart
- SD Union Tribune Chart
- SD Union Trib \$/SqFt Chart
- SF Chronicle Chart

Quarterly Charts:

- Atlanta
- Chicago
- Denver
- Honolulu
- Jacksonville
- Las Vegas
- Miami/Palm Bch
- Nashville
- New York City
- Phoenix
- Portland
- Seattle
- Washington D.C.

Annual Charts:

- CA 2008 City Chart
- LA Times 2008 Chart
- O.C. Register 2008 Chart
- Sac Bee 2008 Chart
- SD Tribune 2008 Chart
- SF Chronicle 2008 Chart

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Recent Releases

California August Home Sales

September 17, 2009

Bay Area August home sales and median price fall

September 17, 2009

Southland home sales fall; median price edges up again

September 15, 2009

Miami July 2009 Home Sale Report

September 4, 2009

Portland July 2009 Home Sales Report

August 31, 2009

Seattle posts first annual sales gain in 3 yrs; median sale price falls

August 29, 2009

Phoenix Region July Home Sales

August 29, 2009

Las Vegas July 2009 Home Sales Report

August 25, 2009

California July Home Sales

August 21, 2009

Bay Area home sales hit 4-year high; median price up again

August 21, 2009

Southland home sales rise again as higher-cost areas awaken

August 18, 2009

Miami June 2009 Home Sale Report

August 6, 2009

Denver June 2009 Home Sale Report

August 3, 2009

Portland June 2009 Home Sales Report

August 3, 2009

Seattle June 2009 Home Sales Report

July 29, 2009

Phoenix June 2009 Home Sales Report

July 29, 2009

Las Vegas June 2009 Home Sales Report

July 24, 2009

California Second Quarter Mortgage Defaults Edge Down

July 22, 2009

California June Home Sales

July 16, 2009

Bay Area home sales and median price rise

July 16, 2009

Southland home sales highest since late '06; median price up again

July 15, 2009

Portland May 2009 Home Sales Report

July 1, 2009

Alameda	1,428	1,780	24.6%	\$440,000	\$340,000	-22.7%
Contra Costa	1,730	1,888	9.1%	\$350,000	\$261,000	-25.4%
Marin	277	265	-4.3%	\$770,000	\$650,000	-15.6%
Napa	125	134	7.2%	\$440,000	\$342,500	-22.2%
Santa Clara	1,660	2,199	32.5%	\$585,500	\$490,000	-16.3%
San Francisco	609	543	-10.8%	\$749,000	\$642,426	-14.2%
San Mateo	648	692	6.8%	\$670,000	\$574,750	-14.2%
Solano	592	715	20.8%	\$275,000	\$200,000	-27.3%
Sonoma	517	555	7.4%	\$362,500	\$328,000	-9.5%
Bay Area	7,586	8,771	15.6%	\$470,000	\$395,000	-16.0%

Source: MDA DataQuick Information Systems, www.DQNews.com

Media calls: Andrew LePage (916) 456-7157 or John Karevoll (909) 867-9534

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Seattle May 2009 Home Sales Report

June 30, 2009

Las Vegas May 2009 Home Sales Report

June 26, 2009

California May Home Sales

June 19, 2009

Uptick in Bay Area home sales and median price

June 18, 2009

Southland median sale price inches up for first time since '07

June 17, 2009

California April Statewide Home Sales/Median Prices

May 22, 2009

Bay Area home sales rise again; median price up slightly over March

May 21, 2009

Southland home sales hot inland, cool on coast; median price dips

May 19, 2009

Phoenix March 2009 Home Sale Report

April 30, 2009

Las Vegas March 2009 Home Sale Report

April 29, 2009

Golden State Mortgage Defaults Jump to Record High

April 22, 2009

California March Statewide Home Sales/Median Prices

April 16, 2009

Bay Area home sales continue climb, median still below \$300K

April 16, 2009

Southland home sales up; median levels off

April 15, 2009

Denver February 2009 Home Sale Report

April 7, 2009

Portland February 2009 Home Sale Report

April 7, 2009

Las Vegas February 2009 Home Sale Report

April 7, 2009

Phoenix February 2009 Home Sale Report

April 7, 2009

Seattle February 2009 Home Sale Report

April 7, 2009

California February Statewide Home Sales/Median Prices

March 19, 2009

Bay Area home sales climb above last year as median falls below \$300K

March 19, 2009

Southland home sales outpace last year again; median price steady

March 17, 2009

California January 2009 Home Sale Report

February 19, 2009

Bay Area home sales top last year again; median drops to \$300K

February 19, 2009



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Month	Aug-2008	Aug-2009	% Change
% Sold Price to Asking Price	98%	98%	1%
Sold Homes	1,187	1,309	10%
Listing Price Per Home	\$ 767,135	\$ 627,747	-18%
Sold Price Per Home	\$ 749,208	\$ 617,151	-18%
Sold Price Per Sq Ft	\$ 443	\$ 373	-16%
MLS Days On Market Per Home	52	55	6%

Month to Month Comparison

Month	Jul-2009	Aug-2009	% Change
% Sold Price to Asking Price	97%	98%	1%
Sold Homes	1,655	1,309	-21%
Listing Price Per Home	\$ 645,924	\$ 627,747	-3%
Sold Price Per Home	\$ 628,226	\$ 617,151	-2%
Sold Price Per Sq Ft	\$ 369	\$ 373	1%
MLS Days On Market Per Home	59	55	-7%

Talk with a local [Silicon Valley & South Bay Real Estate Agent](#). Read detailed [neighborhood profiles in San Francisco Bay Area, CA](#). Search for [Silicon Valley & South Bay homes and condos](#) for sale. *These numbers reflect single family (SFR) and condo homes only. All numbers are from the MLS and are deemed reliable but not guaranteed as of 9/8/09.*

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- [Santa Clara County - Housing Sales Summary for May 2009](#) (ziprealty.typepad.com)

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2 The undersigned declares:

3 I am employed in the County of San Francisco San Francisco, State of California. I am
4 over the age of 18 and am not a party to the within action; my business address is c/o
5 Nossaman LLP, 50 California Street, 34th Floor, San Francisco, California 94111.

6 On September 21, 2009, I served the foregoing:

7 **DEBTOR'S OPPOSITION TO MOTION FOR RELIEF FROM STAY**

8 on parties to the within action as listed below and on the attached service list:

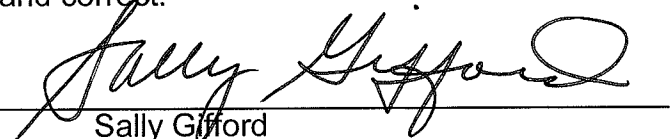
9 ☒ (By Facsimile) I served a true and correct copy by facsimile pursuant to C.C.P. 1013(e),
10 to the number(s) listed on the attached sheet. Said transmission was reported complete
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12 facsimile machine, which report states the time and date of sending and the telephone
13 number of the sending facsimile machine. A copy of that transmission report is attached
14 hereto.

15 Spencer P. Scheer, Esq.
16 Joshua L. Scheer, Esq.
17 Reilly D. Wilkinson, Esq.
18 Jonathan Seigel, Esq.
19 Thomas D. Hicks, Esq.
20 SCHEER LAW GROUP, LLP
21 155 Redwood Drive, Suite 100
22 San Rafael, CA 94903
23 Facsimile: 416-491-8910
24 **Attorneys for Secured Creditor**
25 **BAR-K, INC.**

26 ☒ (By U.S. Mail) On the same date, at my said place of business, an original enclosed in
27 a sealed envelope, addressed as shown on the attached service list was placed for
28 collection and mailing following the usual business practice of my said employer. I am
readily familiar with my said employer's business practice for collection and processing
of correspondence for mailing with the United States Postal Service, and, pursuant to
that practice, the correspondence would be deposited with the United States Postal
Service, with postage thereon fully prepaid, on the same date at San Francisco,
California.

Executed on September 21, 2009.

☒ (FEDERAL) I declare under penalty of perjury under the laws of the United States of
America that the foregoing is true and correct.

26 
Sally Gifford

SERVICE LIST

Donna S. Tamanaha, Assistant U.S. Trustee United States Trustee's Office 235 Pine St # 7 San Francisco, CA 94104-3484	Mark J. Romeo, Esq. Law Offices of Mark J. Romeo 235 Montgomery Street, Suite 410 San Francisco, CA 94104 Attorneys for Claimant TRUST DEED INVESTMENTS, INC.
Spencer P. Scheer, Esq. Joshua L. Scheer, Esq. Reilly D. Wilkinson, Esq. Jonathan Seigel, Esq. Thomas D. Hicks, Esq. SCHEER LAW GROUP, LLP 155 Redwood Drive, Suite 100 San Rafael, CA 94903 Facsimile: 416-491-8910 Attorneys for Secured Creditor BAR-K, INC.	Michael J. McQuaid, Esq. Carr, McClellan, Ingersoll, Thompson & Horn Professional Law Corporation 216 Park Road Burlingame, CA 94010-4206 Attorneys for Creditors Allan and Beverly Sebanc, Trustees of the Sebanc Family Trust
Jane K. Springwater, Esq. FRIEDMAN DUMAS & SPRINGWATER LLP 150 Spear Street, Suite 1600 San Francisco, CA 94105 Attorneys for Creditor Pacific National Bank	Demmie B. Acosta - Debtor raelynnacosta@hotmail.com

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Date: 9/21/09 Time: 10:48 am Pages: 11 [Including cover page]

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